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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WILLIAM EUTZY,

PETITIONER,

-vs-

STATE OF FLORIDA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED
(Restated)

I

WHETHER CERTIORARI SHOULD BE GRANTED TO CONSIDER PETITIONER'S CLAIM THAT THE FLORIDA SUPREME COURT HAS ADOPTED A STANDARD OF PROOF WHICH REQUIRES A DEFENDANT TO DISPROVE THE HEIGHTENED PREMEDITATION REQUIRED TO FIND THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER, WHEN, CONTRARY TO ESTABLISHED FLORIDA LAW, THE ISSUE WAS NOT RAISED UNTIL REHEARING AND CONSEQUENTLY WAS NEVER PASSED UPON AT ALL BY THE FLORIDA SUPREME COURT?

II

WHETHER CERTIORARI SHOULD BE GRANTED TO REVIEW WHETHER THE FLORIDA SUPREME COURT'S INTERPRETATION OF FLORIDA LAW CONCERNING JURY OVERRIDES WAS PROPER IN THIS CASE, WHEN THAT BODY OF LAW HAS RECENTLY BEEN SPECIFICALLY APPROVED BY THIS COURT IN BARCLAY V. FLORIDA, ___ U.S. ___, ?? L.Ed.2d 1134 (1983)?

III

WHETHER CERTIORARI SHOULD BE GRANTED TO REVIEW PETITIONER'S COMPLAINT THAT FLORIDA'S DEATH PENALTY LAW WHICH PERMITS A JUDGE TO REJECT A JURY'S SENTENCE RECOMMENDATION OF LIFE IMPRISONMENT IS UNCONSTITUTIONAL AS APPLIED, WHEN THIS PRECISE CLAIM WAS REJECTED JUST THIS LAST TERM IN SPAZIANO V. FLORIDA, ___ U.S. ___, 82 L.Ed.2d 340 (1984), AND WHEN IN THIS CASE THE ISSUE WAS NOT EVEN CONSIDERED BY THE FLORIDA SUPREME COURT BECAUSE IT WAS NOT TIMELY RAISED?

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
REASONS WHY THE WRIT SHOULD BE DENIED	4
ARGUMENT	
I CERTIORARI SHOULD NOT BE GRANTED BECAUSE WHETHER THE FLORIDA SUPREME COURT HAS ADOPTED AN UNCONSTITUTIONAL STANDARD OF PROOF WHICH REQUIRES A DEFENDANT TO DISPROVE THE HEIGHTENED PREMEDITATION REQUIRED TO FIND THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WAS NOT PASSED UPON BY THE FLORIDA SUPREME COURT BECAUSE THE ISSUE WAS NOT RAISED UNTIL A MOTION FOR REHEARING WAS FILED.	4
II CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE ISSUE OF WHETHER THE FLORIDA SUPREME COURT PROPERLY FOLLOWED ITS OWN LAW CONCERNING JURY OVERRIDES DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION IN LIGHT OF THE COURT'S RECENT OPINION IN BARCLAY V. FLORIDA, ___ U.S. ___, 77 L.Ed.2d 1134 (1983).	6
III CERTIORARI SHOULD BE DENIED BECAUSE WHETHER FLORIDA'S LAW WHICH PERMITS THE JUDGE TO OVERRIDE A JURY'S ADVISORY LIFE SENTENCE IS UNCONSTITUTIONAL AS APPLIED WAS REJECTED JUST THIS PAST TERM IN SPALLAND V. FLORIDA, ___ U.S. ___, 82 L.Ed.2d 340 (1984), AND BECAUSE THIS ISSUE WAS NOT CONSIDERED BY THE FLORIDA SUPREME COURT BECAUSE IT WAS NOT TIMELY RAISED.	10
CONCLUSION	11
CERTIFICATE OF SERVICE	12

TABLE OF CITATIONS

CASES	PAGE
Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d 1134 (1983)	6, 7, 8, 9, 11
Autry v. State, 458 So.2d 755 (Fla. 1984)	1, 6, 10
Cruger v. Burke, 334 U.S. 728 (1948)	8
Jackson v. Virginia, 443 U.S. 307 (1979)	7
Jacobs v. Wainwright, 450 So.2d 200 (Fla.), cert. denied, ___ U.S. ___, 83 L.Ed.2d 413 (1984)	4
Sarmiento v. State, 371 So.2d 1047 (Fla. 3d DCA 1979), approved, 397 So.2d 643 (Fla. 1981)	4
Spaziano v. Florida, ___ U.S. ___, 82 L.Ed.2d 340 (1984)	10, 11
State v. Dixon, 283 So.2d 1 (Fla. 1973)	8
Tacon v. Arizona, 410 U.S. 351 (1973)	4, 7
Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235 (1983)	5, 7, 8

OTHER AUTHORITIES	
Rule 34.1(g), Rules of the Supreme Court	1
Brennan, State Court Decisions And The Supreme Court, 31 Penn. Bar Assn. Q. 393, (1960)	4
§921.141(5)(f), Fla. Stat.	8
§921.141(5)(i), Fla. Stat.	5

STATEMENT OF THE CASE

Petitioner's statement of the case is unacceptable because it is self-serving, contains improper argument and innuendos, and does not contain "appropriate references" to the record as required by Rule 34.1(g) of the Rules of the Supreme Court. The following facts, as found by the Florida Supreme Court in Eutzy v. State, 458 So.2d 755, 756-757 (Fla. 1984), are submitted:

> William Eutzy and his sister-in-law, Laura Eutzy, were stopped in the Pensacola airport by a security guard. Appellant identified himself as Raymond Sanders, but Laura Eutzy gave her correct name. The couple was later seen getting into a taxicab driven by the victim, Herman Hughley.
>
> A dispatcher for the cab company for which Hughley drove testified that Hughley reported picking up a fare at the airport with a destination in Pensacola Beach. Forty-five minutes later, Hughley reported that the destination had been changed to Fort Walton; ten or twenty minutes later he notified the dispatcher that they were going to Panama City. Three-and-a-half hours after the last report, Hughley notified the dispatcher of his return. When the dispatcher asked him to repeat his message she got no response. Repeated attempts to reach Hughley were unsuccessful.
>
> Hughley's body was discovered in the front seat of his cab by a driver for the same cab company, Mary Beasley. She had seen Hughley with the Eutzy couple at the airport the evening before. Her curiosity was aroused when she drove past Hughley's cab, apparently deserted, on the edge of the Pensacola Junior College campus. Other witnesses were able to testify it had been there since approximately the time of Hughley's last contact with his dispatcher.
>
> William and Laura Eutzy were picked up while trying to hitchhike out of town the day after Hughley's body was discovered. They had been spotted by Jackie Humel who was at that time on her way to the police department to make a statement in

the Hughley case. She had seen Hughley and appellant at the spot where Hughley was later discovered dead at about the time Hughley radioed in his last report.

Laura Eutzy had a pistol, later proven to be the murder weapon, in her purse at the time of her arrest. She testified before the grand jury and at Eutzy's trial that she had ridden in the back seat of the cab, sleeping off and on. Eutzy had sat in the front with Hughley. To the best of her knowledge, Eutzy had had only five dollars when they hired the cab; she had had no money. She did not know how they were going to pay the cab fare. Appellant said he would take care of it. When they returned to Pensacola, Eutzy had the cab driver drop Laura off at a Holiday Inn. He then rode off with Hughley. When appellant returned, Laura asked him if he had taken care of the fare. He answered in the negative and he told Laura he had hit the driver on the head with the gun but had not hurt him. Laura testified that she had not been aware that he had taken the gun until he returned it to her at that time. On the morning they were arrested, Laura read a story about Hughley's murder in the local newspaper and realized for the first time what had happened, according to her testimony.

Eutzy was tried for first-degree murder. The jury found him guilty of first-degree premeditated murder, using a special verdict form. At the guilt phase, evidence was presented that Eutzy had a prior conviction for robbery. Eutzy presented no evidence of mitigating circumstances. The jury recommended a life sentence but the judge declined to follow that recommendation. Finding three aggravating factors--conviction of a prior violent felony, murder committed during a robbery, murder was cold, calculated and premeditated--and no mitigating circumstances, the trial judge sentenced Eutzy to death.

The above facts are supplemented with the following evidence which was proven at trial. The State introduced the testimony of a pathologist who stated that the cause of death was a single gunshot wound to the victim's head and that the bullet had entered just slightly behind and above the victim's ear (R 241). The State also introduced testimony

that the fatal bullet had been fired from the gun which was in evidence and that the test pound pull on the trigger of that gun was harder than average (R 250). A state witness testified that because of the residue on the victim's cap, it was estimated that the pistol had been fired from between three and six inches from the victim's head (R 251).

The jury was instructed that each aggravating circumstance must be proved beyond a reasonable doubt (T 332). No objection was made to any of the instructions (T 334).

REASONS WHY THE WRIT SHOULD BE DENIED

ARGUMENT

I

CERTIORARI SHOULD NOT BE GRANTED BECAUSE WHETHER THE FLORIDA SUPREME COURT HAS ADOPTED AN UNCONSTITUTIONAL STANDARD OF PROOF WHICH REQUIRES A DEFENDANT TO DISPROVE THE HEIGHTENED PREMEDITATION REQUIRED TO FIND THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WAS NOT PASSED UPON BY THE FLORIDA SUPREME COURT BECAUSE THE ISSUE WAS NOT RAISED UNTIL A MOTION FOR REHEARING WAS FILED.

This Court has long recognized that the mere presence of a federal question "lurking" in a case is not sufficient to overcome the presence of an adequate non-federal ground which would justify the denial of a petition for writ of certiorari to a state court. When the federal grounds upon which review is sought in this Court were not presented to the state courts, or not properly presented to the state courts, or not passed upon by the state courts, the Court has recognized that it is not appropriate for the Court to exercise its certiorari jurisdiction. Tacon v. Arizona, 410 U.S. 351, 352 (1973). See also Brennan, State Court Decisions And The Supreme Court, 31 Penn. Bar Assn. Q. 393, 399-400 (1960). The reason for the rule, and the reason why Respondent submits that certiorari should be denied in this case, is that the state courts must first be afforded an opportunity to consider and decide the federal question.

Under Florida law the scope of a motion for rehearing is extremely limited--even in a capital case. Jacobs v. Wainwright, 450 So.2d 200, 201 (Fla.), cert. denied, ___ U.S. ___, 83 L.Ed.2d 433 (1984). Florida courts routinely prohibit defendants from raising new matters for the first time on appeal. Sarmiento v. State, 371 So.2d 1047, 1053

(Fla. 3d DCA 1979), approved, 397 So.2d 643 (Fla. 1981). Therefore, since under Florida law this issue was not presented to the state courts in a timely fashion and since the summary denial of the motion for rehearing indicates that the issue was not considered, there exists an adequate and independent state ground to support Petitioner's state court judgment and sentence.

Assuming only for the sake of argument that Petitioner overcomes the jurisdictional hurdle asserted above, Respondent submits that certiorari still should not be granted. This is because there is no constitutional problem with Florida's law concerning the statutory aggravating circumstance listed in §921.141(5)(i), Fla. Stat., i.e., that "[t]he capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification."

In Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235, 249 (1983), the Court recognized that for an aggravating circumstance to be constitutional, it "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." The Court went on to recognize that "[w]hat is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Id. at 77 L.Ed.2d 251.

If Petitioner is contending that this Court's jurisdiction is based upon the fact that in his opinion the cold, calculated, and premeditated aggravating circumstance is unconstitutional, his claim is foreclosed by the Court's opinion in Zant v. Stephens, supra. On the other hand, if Petitioner is contending that this Court should exercise its jurisdiction because the Florida Supreme Court has been

improperly following its own law, his claim is foreclosed by the Court's recent opinion in Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d 1134 (1983). In that case, the Court was faced with an argument that the Florida Supreme Court had improperly been applying its own cases in determining whether to uphold the defendant's death sentence. However, this contention was squarely rejected--"the obvious answer to this question, as indicated in the previous discussion, is that mere errors of state law are not the concern of this Court, Gryger v. Burke, 334 U.S. 728, 731 (1948), unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." Barclay v. Florida, at 77 L.Ed.2d 1149.

Finally, should the Court be concerned that a substantial federal question has been presented (despite the Court's holding in Barclay, supra), review still should not be granted because the facts of Petitioner's case demonstrate that no constitutional violation occurred. This is because the jury in Petitioner's case was clearly instructed by the trial court that "[e]ach aggravating circumstance must be established beyond a reasonable doubt before it can be considered by you in arriving at your decision." (T 332) The instruction could not have been more clear.

Also, as the Florida Supreme Court correctly found, the evidence introduced by the State at trial more than demonstrated the "heightened premeditation" required to sustain the finding of the aggravating circumstance in question. Eutzy v. State, supra at 458 So.2d 758. As was pointed out by the State in its brief on direct appeal, this was the classic execution type killing (Brief of Appellee at 17; Petitioner's appendix 1). The victim was shot in the side of the head from a distance of approximately three to six inches, and there were no signs or evidence of a struggle

which might possibly justify self-defense. Moreover, Petitioner had told Laura Eutzy that he had planned to "take care" of the cab fare, and he lied to her after the murder occurred. It should also be pointed out that Petitioner obtained the pistol sometime prior to the cab ride and that the victim was seen alive in Petitioner's presence just prior to the murder and that the cab was parked in a remote area which ultimately permitted Petitioner to commit the murder without fear of observation.

In summary, this Court should not exercise its discretion to grant certiorari in this case because an adequate independent state ground exists, i.e., the issue was never properly presented to the state courts and the state courts have not ruled upon it. Tacon v. Arizona, supra. In the alternative, the State submits that certiorari should not be granted because the aggravating circumstance in question passes constitutional muster under Zant v. Stephens, supra. If Petitioner's argument is that the Florida Supreme Court has not been applying its own law properly, such argument is foreclosed by this Court's recent opinion in Barclay v. Florida, supra. The Florida Supreme Court found as a matter of fact under state law that the aggravating circumstance existed. This factual finding is supported by the record and offers no reasonable basis for this Court to grant review. The jury was instructed that each aggravating circumstance must be proven beyond a reasonable doubt and the evidence as summarized by the Florida Supreme Court was more than sufficient from which the aggravating circumstance could be found to have been established beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979).

II

CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE ISSUE OF WHETHER THE FLORIDA SUPREME COURT PROPERLY FOLLOWED ITS OWN LAW CONCERNING JURY OVERRIDES DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION IN LIGHT OF THE COURT'S RECENT OPINION IN BARCLAY V. FLORIDA, ___ U.S. ___, 77 L.Ed.2d 1134 (1983).

In essence, Petitioner has asked this Court to review his case merely on the basis that he disagrees with the Court's opinion in Barclay v. Florida, supra. Despite the fact that Barclay involved a jury recommendation of life which was overridden by the trial court, and despite the fact that in Barclay (as in Petitioner's case), no mitigating circumstances existed, Petitioner is contending that jury overrides are constitutionally impermissible when the trial court relies upon an aggravating circumstance which has been thrown out by the Florida Supreme Court. It is the State's position that the Court should not exercise its certiorari jurisdiction to re-decide in this case what it just decided in 1983.

It should also be pointed out that even counsel for Petitioner has recognized that under Florida law, only one aggravating circumstance is required to support a sentence of death. See State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), which was cited at page 20 of the petition for writ of certiorari. See also Zant v. Stephens, supra. Moreover, it should not be overlooked that the only reason the aggravating circumstance in question was thrown out was because the State thought the case involved a robbery whereas the Florida Supreme Court concluded that the State should have attempted to prove the aggravating circumstance involving whether the murder was committed for pecuniary gain. See §921.141(5)(f), Fla. Stat. Thus, when applying the so-called "harmless error rule," the Florida Supreme Court realized that Petitioner could have been tagged with three valid aggravating circumstances rather than two.

In any event, the State contends that certiorari should not be granted on this issue because Barclay held that a death sentence was constitutional even though an aggravating circumstance has been thrown out by the state appellate court. And this is especially true when, as in Petitioner's case, there was no evidence submitted in mitigation and no evidence was found by the trial court to justify a mitigating circumstance.

III

CERTIORARI SHOULD BE DENIED BECAUSE WHETHER FLORIDA'S LAW WHICH PERMITS THE JUDGE TO OVERRIDE A JURY'S ADVISORY LIFE SENTENCE IS UNCONSTITUTIONAL AS APPLIED WAS REJECTED JUST THIS PAST TERM IN SPAZIANO V. FLORIDA, ___ U.S. ___, 82 L.Ed.2d 340 (1984), AND BECAUSE THIS ISSUE WAS NOT CONSIDERED BY THE FLORIDA SUPREME COURT BECAUSE IT WAS NOT TIMELY RAISED.

Certiorari should be denied on the issue of whether Florida's law is unconstitutional as applied because the Court just decided this question in Spaziano v. Florida, supra. However, should the Court somehow be persuaded that it should revisit its opinion in that case, the State submits that Petitioner's case is inappropriate for review because the Florida Supreme Court refused to consider the issue on its merits because Petitioner did not timely raise the issue in the state courts. It cannot be disputed that the Florida Supreme Court squarely held that "[t]his issue was not timely raised before the trial court and thus was not preserved for appeal." Eutzy v. State, supra at 458 So.2d 757. Accordingly, review should not be granted on this issue.

CONCLUSION

The State of Florida respectfully submits that certiorari should not be granted because the issues upon which review is sought either were not properly presented to and ruled upon by the state supreme court or because the issues have already been decided adversely to Petitioner in both Barclay v. Florida, supra, and Spaziano v. Florida, supra. The lower court's opinion is constitutionally sound, and Petitioner has offered no substantial federal question which needs to be resolved by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Steven L. Bolotin, Assistant Public Defender, Second Judicial Circuit, Post Office Box 671, Tallahassee, Florida, 32302, on this 28th day of February, 1985.

Lawrence A. Kaden

LAWRENCE A. KADEN

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